

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS NUMBER: 99-0457**  
**Sales/Use Tax**  
**For the Years 1992-1998**

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**ISSUES**

**I. Tax Administration - Best information available**

**Authority:** Ind. Code § 6-2.5-4-4; Ind. Code § 6-8.1-5-1; Ind. Code § 6-8.1-5-4

Taxpayer protests the Department's assessment of sales tax with respect to Indiana sales at auctions, based on auditor reliance on prior year income tax returns.

**II. Tax Administration - Penalty**

**Authority:** Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2(b).

Taxpayer protests the imposition of the ten percent (10%) negligence penalty.

**STATEMENT OF FACTS**

Taxpayer was an operator of a motel for several years. Taxpayer did not file sales tax returns or remit sales tax for any of those years. The Department audited taxpayer for sales tax during the period in question. Taxpayer had claimed a sales tax exemption based on rentals of motel rooms for longer than thirty days. When auditor requested to review taxpayer's records with respect to the potential sales tax, taxpayer stated that the records had been destroyed upon sale of the motel. As a result, taxpayer was assessed sales tax based on income tax returns filed by taxpayer for the prior years.

**I. Tax Administration-Best information available**

**DISCUSSION**

In general, if a person rents real estate to a person for less than thirty (30) days, the person is considered to make a retail sale. Ind. Code § 6-2.5-4-4 (a). If the rental period is greater than 30 days, the person is not making a retail sale. *Id.* Here, the crucial question for taxability of the motel rentals is the length of visitors' stays, and whether taxpayer can verify that renters stayed for greater than 30 days.

Ind. Code § 6-8.1-5-4(a) states that:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

In addition, Ind. Code § 6-8.1-5-1(a) states that the Department can compose tax based on the best information available to the Department.

In this case, the best information available to the Department was the taxpayer's income tax returns for the years in which taxpayer filed income tax returns. For the other taxable years, the auditor used an average of the income from the years in which taxpayer filed returns. From this, the auditor determined that the taxpayer's sales were those reported as income on the taxpayer's income tax returns, or estimated to be income. "[T]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made", Ind. Code § 6-8.1-5-1(b), though such presumption is rebuttable by taxpayer. *Id.* Taxpayer argues that the last four years of the motel's operation constituted rentals exempt from sales tax. At the designated time of the hearing, taxpayer was called three times, but did not answer his telephone on any of those occasions. Further, the very information that taxpayer could have used to show the length of visitors' stays was not presented to the Department.

### **FINDING**

Taxpayer's protest is denied.

## **II. Tax Administration - Penalty**

### **DISCUSSION**

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides in 45 IAC 15-11-2:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to

negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer relates that taxpayer is not a sophisticated taxpayer. While the Department is aware of this, a basic duty of care exists for all taxpayers, from individuals of the most modest means to the largest corporations. That duty is one of knowledge of tax laws, knowledge of payment and filing deadlines, and record keeping of one's own business and personal affairs sufficient to retrace their prior financial transactions as necessary for a reasonable period of time. To impute less of a duty is to allow for carelessness or even intentional ignorance to be a defense-something that no effective legal system can permit. If a taxpayer is not certain of the scope of that duty, professional advice and even the occasional question to the Department is available. Taxpayer apparently sought professional advice prior to the operating the business; however, the advice appeared to ignore a long-standing statute. Taxpayer's reliance on that advice in the face of a clearly contrary statute was negligent for the first three years of the period.

For the last four years of the period, taxpayer maintains that it was not subject to the tax based on its change of operations to longer-term rentals. While appropriate facts and circumstances may exist in similar cases for a waiver, particularly in the case of an isolated transaction out of many, taxpayer has not made such a showing in this case.

### **FINDING**

Taxpayer's protest is denied.